

It could have been worse

A Historian's Impression of the Conference “Contingency in International Law: How International law could have been”

ajv2016

2018-07-17T19:38:31

Both historians and jurists are intrigued by the future: historians – despite their habitual claims to the contrary – wish to say something meaningful about the future by studying the past, whereas jurists make and render law in order to establish justice, lawfulness, and ultimately peace. Yet, while historians at times reject the “learning from the past” paradigm, fearing an oversimplification of history, the papers presented at the conference on [“Contingency in the Course of International Law – How international Law could have been”](#) at the University of Amsterdam, 14-16 June 2018, organised by Kevin Jon Heller and Ingo Venzke, often seemed to aim exactly at this: to learn from the past's mistakes and apply such insights so as to change the future of international law. The majority of papers used counterfactual narratives (deliberately or unconsciously) as a call to change international law, to end legal, and ultimately, social inequality. Contingency seemed, in the respective presentations, sometimes as the uttering of wishes, as an attempt to dismantle historical failures, and detect future opportunities.

Most of the participants and interested listeners were in one way or the other linked to the legal profession – either as scholars or practitioners and sometimes both. In 49 presentations and 16 parallel panels, the workshop was a massive attempt to approach the term #contingency# and its uses in writing the history of international law. Both implicitly and explicitly, Susan Marks' [2009 article on “False Contingency”](#) was the key point of reference, and one of the two main areas of the manifold contributions therefore focused on theoretically informed approaches towards the concept of contingency, such as approaches based on Marxism, post-structuralism, and historical institutional economics. Furthermore, counterfactuals were depicted as options to be included in the literary genre of utopian and dystopian fiction in order to mark turning points of a feminist approach to international law-making (Karen Knop).

Secondly, contingency was connected to individuals' and institutions' concrete legal actions. Here, a vast variety of case studies shed light on subjects such as the role of dissenting opinions in international criminal law and of possible other, alternative trial outcomes (Mark Drumbl), the ‘if’ of African revolutionary careers and the contingencies of their assassinations – both complicating and aggravating political and social change (Vidyar Kumar) –, and never-established courts such as that of Arbitral Justice (Aden Knaap), to name but a few. A strong asset of the assembled contributions was their breadth, with a spectrum reaching from the School of Salamanca (Marc Hanna) to the question of how corporations could become bearer of human rights (Silvia Steininger and Jochen von Bernstorff). Technological contingency as a factor international law has to deal with (Fleur Johns, Geoffrey Gordon), the explanations for why starvation did

not become central in international criminal law (Nicholas Mulder and Boyd van Dijk), the role of state power within international law and its “everyday bordering” (Henry Jones), and the question why open borders did not prevail in international migration law (Frédéric Mégret) were among the topics presented. Intensive discussions arose from the aspect of power of contingency and the antonyms “contingency” and “necessity”. Methodologically, a clear line between contingency (as empirically verifiable past) and counterfactuals (i.e., empirically unverifiable past futures) was not always established with sufficient clarity. Moreover, the question whether “necessity” is an analytically useful category at all when all historical explanations are constructs anyway would have been interesting to discuss here.

By deconstructing contingency, the methodological traps in connection to how to detect past alternatives seem infinite. Not only may the relationship between structure and agency and the underlying question of driving forces remain opaque, the temptation to blame contemporaries for their past failures is methodologically not always all that easy to avoid. Also, the specific historical context of legal thought comes on top of it with its discursive power and complicates the occasional schism between legal theory and legal practice even more.

In the context of its relevance for modern societies, contingency has been described by sociologists such as Niklas Luhmann as neither necessary nor impossible. That means contingency is first and foremost non-normative. So what if, after measuring and evaluating the counterfactual alternatives, it turned out that international law could not have been different? What if it revealed that there was no opposite to what one was actually looking for? What if alternatives to contingency revealed themselves as actual disappointments? And, perhaps even more disappointing, what if it could have been (much) worse?

A central factor determining and often limiting historical research are the sources available. Different actors produce different sources. Many actors, however, did never produce any, therefore not only the selection of sources but, one step earlier in the historiographical work flow, their selectivity are key problems to tackle in any legal historical analysis, as Genevieve Renard Painter pointed out in her conference presentation. If historians prefer turning to the past in order to look into the future, this conference was very much an image of the present, and, not only, but especially inspiring for historians with an interest in international law to watch and listen to. These speakers, after all, were their subjects at work.

[*Mala Loth*](#) is a PhD candidate at the University of Oslo.

Cite as: Mala Loth, “It could have been worse. A Historian’s Impression of the Conference »Contingency in International Law: How International law could have been«”, *Völkerrechtsblog*, 17 July 2018, doi: 12345678.

